



The issue on appeal is whether the ALJ erred in finding the king-size adjustable bed is necessary to cure and relieve claimant of the effects of his injury.

#### **FINDINGS OF FACT**

This is the second appeal of this claim before the Board. The ALJ granted claimant's request for a king-size adjustable bed in a prior Order dated March 4, 2015. Respondent appealed to the Board and the Order authorizing the adjustable bed was reversed due to a lack of persuasive medical evidence. The Board has summarized the evidence in some detail and, rather than unnecessarily repeat the facts again, the Board will adopt its fact recitation contained in its earlier opinion dated May 22, 2015.

Claimant was referred by the ALJ for a court ordered independent medical examination (IME) on November 12, 2013, with R. Sean Jackson, M.D., who diagnosed claimant with persistent back pain and left leg numbness, status post L4-5 fusion with a combined anterior lumbar interbody fusion followed by posterior fusion. Dr. Jackson did not recommend another surgery for claimant, finding none that would benefit claimant. He also determined that epidural steroid injections would most likely not be beneficial. However, a spinal cord stimulator or pain pump might, in his opinion, be an option. He agreed that assistive devices are a reasonable consideration. In a February 12, 2014, letter response to claimant's counsel, he recommended a quality supportive bed, but not an adjustable or king-size one and objected to a tub unit with jets, but agreed that a chair lift would be appropriate.

At the November 4, 2015, preliminary hearing, claimant presented two medical reports, one from neurologist, Wade B. Welch, M.D., and one from Justin S. Whitlow, M.D., indicating the adjustable king-size bed is reasonable and necessary to cure and relieve the effects of claimant's injury. Respondent objected, contending there is insufficient evidence for claimant to meet his burden of proving an adjustable bed is necessary to cure and relieve claimant of the effects of the 2006 injury. Respondent argued the ALJ made no mention of Dr. Hu's report, which states there is no medical evidence that an adjustable bed would benefit someone with claimant's condition, nor was the opinion of Dr. Jackson, the court-ordered orthopedic surgeon, mentioned in the order.

Claimant originally met with Dr. Welch on October 15, 2014, with a followup on August 12, 2015, for evaluation and treatment recommendations for failed back syndrome. This was upon referral by his military health care provider, Mr. Calkins, P.A. Claimant presented with chronic low back pain, left lower extremity weakness and numbness. Dr. Welch noted claimant reported sleeping in a recliner since 2008, due to pain. Dr. Welch found claimant's condition to be chronic and opined it was reasonable "to pursue adjustable bed but would defer to a physiatrist for specific recommendations in regards to assistive devices pain management/therapeutic strategies."<sup>1</sup>

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<sup>1</sup> P.H. Trans. (Nov. 4, 2015), Cl. Ex. 1.

Claimant met with Dr. Whitlow, on October 15, 2015, upon referral by the Irwin Army Community Hospital. Claimant presented with low back and left leg pain. Dr. Whitlow examined claimant and opined claimant had failed back surgical syndrome. He listed treatment recommendations of continued conservative pain management, possible spinal cord stimulator, investment in an adjustable king-size bed and walk-in Jacuzzi tub. He did not feel another surgery would be a good option for claimant.

Claimant met with Zhengyu Hu, M.D., M.S., a board certified physiatrist, on November 9, 2015. Claimant complained of low back pain on both sides, with the left being worse than the right and going down to the left hip and down the left leg through the knee. Claimant also had weakness in his left leg. Dr. Hu noted claimant told him he had been sleeping in a recliner since 2008. Dr. Hu indicated an electronic adjusted bed would benefit claimant's back.

Dr. Hu recommended a procedure that would target the facet joints to see if claimant is a candidate for Radio Frequency Ablation (RFA). He felt an injection along with the Jacuzzi could help to reduce claimant's pain and help him sleep on his existing bed. Dr. Hu did not feel there was any medical evidence showing the adjustable bed would be beneficial for someone with facet joint pain.

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>2</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>3</sup>

K.S.A. 2006 Supp. 44-510h(a) states:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

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<sup>2</sup> K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

<sup>3</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

The Board originally determined claimant had failed to prove the adjustable bed was necessary to cure and relieve claimant of the effects of the 2006 injury. However, the addition of the opinions of Dr. Welch and Dr. Whitlow have convinced the Board that a king-size adjustable bed is necessary in this instance. Claimant has been sleeping in a recliner since 2008. An adjustable bed would provide a similar sleep position. Additionally, as claimant is very tall, the king-size aspect of the bed appears necessary to accommodate claimant.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Order of the ALJ should be affirmed. Claimant has proven a king-size adjustable bed is necessary to cure and relieve him of the effects of his 2006 accidental injury.

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the Board that the Order on Preliminary and Post-Award Application of Administrative Law Judge Rebecca Sanders dated December 29, 2015, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 2016.

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BOARD MEMBER

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BOARD MEMBER

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